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12 **STATE OF CALIFORNIA**
13 **NEW MOTOR VEHICLE BOARD**

14 In the Matter of the Protest of)

15 FOLSOM CHEVROLET, INC. d/b/a FOLSOM)
CHEVROLET,)

16 Protestant,)

17 v.)

18 GENERAL MOTORS, LLC,)

19 Respondent.)

Protest No.: PR-2483-16

**RESPONDENT GENERAL MOTORS
LLC'S POST-HEARING BRIEF**

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7 **STATUTES**

8 Cal. Veh. Code § 30616, 7, 22, 25, 26, 27, 28

9 Cal. Veh. Code § 30666

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1 Respondent General Motors LLC ("General Motors" or "GM") submits its Post-Hearing
2 Brief in connection with this protest commenced by Protestant Folsom Chevrolet, Inc. d/b/a Folsom
3 Chevrolet ("Folsom Chevrolet").

4 INTRODUCTION

5 Folsom Chevrolet is a Chevrolet dealership located in Folsom, California, which has
6 struggled to make retail sales and provide satisfactory customer service for years. Despite General
7 Motors' constant counseling and assistance, Folsom Chevrolet has consistently been among the
8 worst-performing Chevrolet dealerships in all of California for over half a decade. This poor
9 performance is due to the dealership's own operational choices, including a decision to continuously
10 prioritize more-lucrative fleet sales outside the area at the expense of local retail customers. Due to
11 Folsom Chevrolet's choices, which lead to its inability to adequately serve existing and prospective
12 customers in its territory, and numerous breaches of the Dealer Sales and Service Agreement,
13 including breaches relating to customer service obligations, General Motors was left with no choice
14 but to pursue termination of the agreement.

15 The evidence at this hearing proved that General Motors has "good cause" to terminate the
16 Dealer Sales and Service Agreement of Folsom Chevrolet pursuant to the California Vehicle Code.
17 Folsom Chevrolet has been in continuous breach of the sales performance obligations of its Dealer
18 Sales and Service Agreement since at least 2011, and its failures are serious enough to warrant
19 termination on that factor alone. However, its sales performance is merely a manifestation of the
20 flaws in the dealership's business operations, which have ultimately rendered it unwilling, and thus,
21 unable, to provide acceptable retail sales performance and customer satisfaction and effectively
22 represent Chevrolet. Folsom Chevrolet's sales have been poor because, among other reasons:

- 23 • Folsom Chevrolet has robbed its inventory, intended for retail customers, in order to
24 make fleet and commercial sales;
- 25 • Folsom Chevrolet has consistently failed to provide adequate customer satisfaction,
26 particularly during the new vehicle purchasing experience;
- 27 • Folsom Chevrolet has markedly low loyalty rates for the customers who do purchase
28 vehicles at the dealership, meaning the customers it does have are not likely to return

1 to purchase their next vehicle; :

- 2 • Folsom Chevrolet does not competitively price its new vehicles;
- 3 • Folsom Chevrolet has failed to implement a fully functional business development
- 4 center ("BDC"); and
- 5 • Folsom Chevrolet has failed to hold its personnel accountable for their job
- 6 responsibilities.

7 Despite GM's substantial efforts to coach and counsel the dealership on these and other
8 concerns, Folsom Chevrolet failed to rectify any of these issues, and continues to try to evade blame
9 for its own fleet sales practices. However, the record reflects that its excuses, and others presented
10 by the dealership, cannot stand up to scrutiny. The only cause of Folsom Chevrolet's poor
11 performance and breaches of the Dealer Sales and Service Agreement are its own choices. For these
12 reasons and those discussed below, General Motors has good cause to terminate the agreement.

13 **BACKGROUND**

14 The facts and procedural background underlying this Protest are set forth in detail in GM's
15 companion Proposed Findings of Fact and Conclusions of Law¹ ("PFF"). The PFF includes a review
16 of the parties (¶¶ 2-3), the Protest & Hearing (¶¶ 4-9), relevant provisions of the Dealer Sales and
17 Service Agreement ("Dealer Agreement") between the parties (¶¶ 10-32), a timeline of relevant
18 events (¶¶ 33-123), an analysis of potential causes of Folsom Chevrolet's poor sales performance (¶¶
19 124-204), an explanation and application of relevant GM policies and procedures expected to be
20 challenged by Folsom Chevrolet (¶¶ 205-330), and a breakdown of Folsom Chevrolet's investments
21 in the franchise as contemplated by the Vehicle Code (¶¶ 331-372). The PFF also contains proposed
22 conclusions of law (¶¶ 373-390) and a proposed decision (¶ 391). It is incorporated by reference into
23 this Post-Hearing Brief.

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25
26
27 ¹ All paragraph citations in this brief are to the PFF unless otherwise indicated.

GENERAL MOTORS HAS "GOOD CAUSE" TO TERMINATE
FOLSOM CHEVROLET'S DEALER AGREEMENT

General Motors presented evidence at the hearing sufficient to meet its burden to establish good cause for the termination of the Dealer Agreement. *Cal. Veh. Code § 3066(b)*. In determining whether good cause has been shown, the Board "shall take into consideration the existing circumstances, including, but not limited to":

- a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- c) Permanency of the investment.
- d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.
- g) Extent of franchisee's failure to comply with the terms of the franchise.

Cal. Veh. Code § 3061.

"In determining whether good cause has been established, the Board must consider all of the factors set forth in section 3061 for which evidence has been presented from any party." *Ford Motor Co. v. New Motor Vehicle Bd.* (Jan. 29, 1997) Cal. Super. Ct., No. 96CS0247, at 3 (The reasons listed in the notice of termination did not "limit the Board as to the [section 3061] factors it could consider had evidence been presented on any additional factors by either party."). However, General Motors does not need to prevail on—or even offer evidence of—all of the factors in section 3061. Rather, the Board is "required to weigh the **relevant** factors and determine **whether the weight of those factors favors termination of the franchise** or its continuation." *Id.* (emphasis added). Moreover, section 3061 "expressly states the listed factors are not exclusive, and 'the board shall take into consideration the existing circumstances.'" *Duarte & Witting, Inc. v. New Motor Vehicle*

1 *Bd.* (2002) 104 Cal. App. 4th 626, 642. When the evidence in the record is weighed against the
2 specific factors in section 3061, there is only one conclusion: General Motors has good cause to
3 terminate Folsom Chevrolet's Dealer Agreement.

4 **I. FOLSOM CHEVROLET'S SALES IN RELATION TO THE MARKET ARE**
5 **DISMAL (CAL. VEH. CODE § 3061(A))**

6 The first good cause factor considers the amount of sales Folsom Chevrolet has attained
7 relative to the business available to it. Cal. Veh. Code § 3061(a). Poor sales alone may be sufficient
8 to warrant the termination of a franchise, as "nothing in [section 3061] prohibits a finding that, in
9 any given set of facts, one factor may be so egregious that it would outweigh any remaining factors
10 as to which proof was adduced." *Ford Motor Co.*, No. 96CS0247, at 5. Although good cause exists
11 on numerous grounds warranting the termination of the Dealer Agreement, Folsom Chevrolet's
12 years of substandard retail sales are "so egregious that it would outweigh any remaining factors,"
13 and are sufficient by themselves to establish good cause. (*Id.*)

14 **A. Folsom Chevrolet has Failed to Capture the Retail Sales Available to it**

15 As the following chart shows, since 2012, Folsom Chevrolet has consistently failed to
16 capture the retail business available to it.

17

Folsom Chevrolet Sales vs. Expectations				
	Retail Sales	Expected Sales	Variance	RSI
2012	373	787	-414	47.4
2013	370	904	-534	40.9
2014	428	963	-535	44.4
2015	652	1142	-490	57.1
2016	738	1324	-586	55.7
Q3 2017	567	1124	-557	50.4
2017 ²	849	1499*	-650*	56.6*

22

23 (R270.)

24 By signing the Dealer Agreement, Folsom Chevrolet contractually agreed that satisfactory-
25 rated performance of its sales obligations required it to achieve 100 RSI. (¶¶ 20-23.) However, the
26

27 ² In the chart, expectations, variance, and RSI are extrapolated based on expected sales rate
28 through Q3 (125/month). The retail sales number for full-year 2017 is actual, however.

1 dealership has not hit even 60 RSI—itself a failing grade—in more than half a decade. The extent of
2 the underperformance is staggering. From 2012-2017 (as extrapolated), the dealership sold 3,410
3 vehicles at retail against 6,619 expected sales, failing to capture a combined total of 3,209 new retail
4 sales in just six years.

5 This is not normal. Folsom Chevrolet has been one of the worst performing Chevrolet dealers
6 in the state of California since 2012. (¶¶ 54, 57, 79, 104, 109.) The dealership is a poor performer no
7 matter how the data is sliced. For example, Folsom Chevrolet ranks last among the five Sacramento
8 dealers using the normal RSI calculation, but it continues to rank last in that group when the average
9 market share data benchmark is changed from the State of California as a whole to a smaller area,
10 such as Northern California, the Sacramento Designated Market Area (“DMA”), or Sacramento
11 alone. (¶ 298.)

12 In fact, even using the purported demographic model suggested by Mr. Stockton, Folsom
13 Chevrolet still comes in last among the 5 Sacramento dealerships. (¶ 299.) These are adjustments put
14 forward by Folsom Chevrolet’s own expert, from a firm that has “been working on this issue for
15 decades” and spent literally hundreds of hours on analysis for this case, and they *still* confirm that
16 Folsom Chevrolet is the least effective dealer in the Sacramento market. (¶¶ 299, 312.)

17 Similarly, Mr. Farhat’s “ring” analysis, which looks solely to sales effectiveness within 2-
18 mile “rings” around the dealership, found that Folsom Chevrolet captures sales at a far lower rate
19 than the other Sacramento dealers at every range, but particularly in the closest “rings.” (¶ 300.)
20 Folsom Chevrolet’s poor performance in this metric cannot be attributed to its AGSSA, nor can it be
21 attributed to local conditions, because it was measured solely against other Sacramento dealers. (*Id.*)
22 Mr. Stockton attempted to undercut this analysis, but he misapplied data in a way that both “deflated
23 the expectation and inflated the sales.” (¶¶ 322-325.) When the data was properly considered,
24 Folsom Chevrolet was determined to be only 71% as effective as its closest competitors. (¶ 324.)

25 In sum, the record reflects that Folsom Chevrolet captures only a fraction of the business
26 available to it, regardless of the metric used. Accordingly, this factor strongly supports termination.

27 **B. Folsom Chevrolet’s Failures are Due to Its Operational Decisions**

28 Folsom Chevrolet’s underperformance with respect to retail sales is a fact, and GM has no

1 obligation to identify the specific reasons why Folsom Chevrolet's sales were so poor compared to
2 the opportunities available to it. That said, the causes of Folsom Chevrolet's poor sales are relevant
3 insofar as they were within the control of the dealership. GM presents the following potential causes
4 of Folsom Chevrolet's poor performance to show that Folsom Chevrolet's poor sales were the result
5 of dealership operational decisions, and not bad luck, random chance, or any other excuse.

6 **1. Folsom Chevrolet Repeatedly Robbed its Inventory for Fleet Customers**

7 Chief among Folsom Chevrolet's issues was its consistent—and ongoing—practice of selling
8 or trading its inventory—designed to attract and sell to retail customers—to satisfy fleet customers.
9 This practice runs contrary to GM's suggested practices and harms the dealership's stock of new
10 vehicles. As a result, the dealership's ability to make retail sales was greatly diminished.

11 a. Inventory is a Key Aspect of Retail Sales

12 Witnesses from both GM and Folsom Chevrolet agreed that inventory is an absolutely
13 critical aspect of retail sales. (¶¶ 126-132.) Vehicle inventory is more important than ever in the
14 Internet era. (*Id.*) GM and Folsom Chevrolet witnesses also agreed that there are key differences
15 between the vehicles preferred by retail customers and those intended for fleet or small business
16 purchasers. (¶¶ 133-135.)

17 GM's dealer network is rationally built around having those dealers make retail sales. (¶¶
18 260-268.) Because inventory is so important to making retail sales, GM has a series of policies in
19 place that prohibit dealers from carrying an inventory of vehicles for fleet customers (¶¶ 139-140)
20 and GM "highly" discourages selling units in inventory to fleet purchasers (¶¶ 141-142). The
21 purpose of these policies is to encourage dealers to use their inventory to serve their retail customers.
22 As Mr. Muter put it: "You don't need a dealer in Folsom, California to sell to fleet customers in
23 Anaheim, California. You can put that dealer anywhere. We do need a dealer in Folsom, California
24 to address the retail market." (¶ 267.)

25 b. Folsom Chevrolet Makes Fleet Sales From its Inventory

26 The record reflects that, rather than following GM's suggestions and policies, Folsom
27 Chevrolet and its fleet manager, Mr. Rene Schoonbrood, have built an alternative business model
28 based around selling or trading units in inventory, intended for retail customers, to satisfy fleet

1 customers. (¶¶ 144-152.) The practice is quite lucrative, because “fleets will pay a premium to have
2 the unit readily available as opposed to just waiting for the fleet unit to be ordered.” (¶ 144.)

3 Mr. Schoonbrood estimated he sells 270 to 360 vehicles this way each year. (¶ 146.) The
4 sales often occur in large chunks; Mr. Schoonbrood acknowledged “I’ve done a few, 10, 15 or 20, at
5 one time,” and Larry Crossan agreed that Mr. Schoonbrood “would do, you know, three, four, five
6 and then sometimes he’d do 15 or 20.” (¶ 147.) In fact, Mr. Schoonbrood sold seven vehicles out of
7 inventory in a single transaction the week before he testified. (*Id.*)

8 The result is that a very high proportion of Folsom Chevrolet’s inventory is sold to fleet
9 customers—in 2017, 31.5% of the vehicles delivered to the dealership as retail. (¶ 148.) By
10 comparison, only 3.52% of Chevrolet sales are made that way overall by dealers nationwide,
11 including just 7.25% of sales by the average dealership in the Business Elite program.³ (*Id.*) The
12 numbers for 2016 and 2015 were similar, but the trend actually shows an overall increase in fleet
13 sales from stock by Folsom Chevrolet, meaning the dealership is actually moving towards an even
14 greater percentage of stock being utilized for fleet sales each year. (*Id.*)

15 To sustain these sales, Folsom Chevrolet orders for its inventory a significant number of
16 units with trim and color choices that are generally attractive to fleet customers, rather than retail
17 customers. (¶¶ 156-157.) The dealership produced a chart in discovery that makes clear that these
18 types of vehicles are a sizeable portion of its inventory. (¶ 157.) The percentage earmarked for fleet
19 ranges from a low of 24% to a high of 76% across 2014-2016, and typically includes triple-digit
20 numbers of fleet-type units. (*Id.*) Not coincidentally, it appears Mr. Schoonbrood had primary
21 responsibility for ordering vehicles for Folsom Chevrolet’s inventory during 2014 and much of
22 2015. (¶¶ 153-155.)

23 In addition, Folsom Chevrolet trades vehicles from its inventory to other dealers, in exchange
24 for vehicles desired by its fleet customers. (¶¶ 149-152.) Although it claims this practice is tightly
25 controlled, Mr. Schoonbrood testified that the majority of his trades have been permitted by the
26

27 ³ The Business Elite program is a voluntary program for dealerships that wish to maximize
28 fleet and small business sales. (¶ 15.)

1 dealership. (¶ 150.) Furthermore, Mr. Schoonbrood appears to have the ability to trade any fleet-type
2 unit already in stock, which as noted above is a significant portion of Folsom Chevrolet's inventory.
3 (¶ 151.) As a result, analysis revealed that the dealership traded out 263 vehicles in 2017, 99% of
4 which—261—were originally ordered through retail allocation. (¶ 152.) However, of the units the
5 dealership received back, only 57% were ultimately reported sold to a retail customer, while 43%
6 were reported sold to a fleet customer. (*Id.*) Thus, Folsom Chevrolet suffered a net loss of 90 units
7 intended for retail customers to its inventory due to trading activity. (*Id.*)

8 c. Folsom Chevrolet's Fleet Practices Caused its Inventory to Become
9 Imbalanced and Inadequate

10 Folsom Chevrolet's practices of selling its inventory to fleet customers, trading units in
11 inventory to satisfy fleet customers, and ordering and earmarking disproportionate numbers of
12 "fleet-type" vehicles resulted in serious inventory imbalances.

13 Mr. Muiter testified that "a high percentage of [Folsom Chevrolet's] vehicles are sold to the
14 retail customer out of stock. . . . [T]he retail stock is being depleted in order to satisfy fleet
15 customers." (¶ 158.) Mr. Stinson's investigations in 2014 found the same thing, revealing that
16 Folsom Chevrolet's overall inventory numbers were hiding "pockets of deficiency" in key vehicle
17 lines like Silverado. (¶ 159.) This was due to the "big trend" of selling units in inventory to fleet
18 customers, which results in a "constant imbalance of your retail stock." (*Id.*) Mr. Escalante similarly
19 agreed that Folsom Chevrolet's inventory was "unusually highly skewed towards fleet units." (¶
20 161.)

21 The result of the inventory imbalance was that the dealership's inventory became
22 significantly less attractive to retail customers, who typically look at dealerships' inventories before
23 they ever decide to visit in person. (¶ 162.) These practices therefore "[a]bsolutely" had "a potential
24 negative and harmful impact on the sales rate of the dealership," and made it extremely difficult for
25 GM to help Folsom Chevrolet improve. (*Id.*)

26 d. Folsom Chevrolet Knew it was Operating Outside of GM's Suggested
27 Practices, but Continued Anyway

28 Folsom Chevrolet knew its fleet practices were against GM guidelines and harming its retail

1 sales, but continued to make those sales anyway. Mr. Escalante testified that beginning in 2014, he
2 specifically recommended that Folsom Chevrolet utilize the “traditional method to them of ordering
3 fleet . . . and not use the retail inventory so heavily, because they, in my opinion, needed the
4 inventory.” (¶ 164.) Similarly, Mr. Stinson discussed the issue with Mr. Crossan during the quarterly
5 contact process, stressing that “discipline needs to be instituted” and “you need to get your fleet
6 managers to order the vehicles and wait the 6 to 8 weeks.” (¶ 165.) However, Mr. Crossan failed to
7 take any concrete action in response. (*Id.*)

8 Dealership personnel, meanwhile, acknowledged at the hearing that units in inventory are
9 intended for retail customers. (¶¶ 166-167.) In fact, Mr. Crossan stated in a July 2015 letter to GM
10 that “our large number of fleet sales diminishes our inventory levels and adversely impacts our
11 ability to make additional retail sales.” (¶ 168.) He also described Folsom Chevrolet as “a victim of
12 its own success as an elite GM fleet sales dealership,” because “we consistently struggle to maintain
13 the inventory necessary to achieve our *retail* sales goals.” (*Id.*) He described the issue during the
14 hearing as: “some of what would be considered a custom fleet . . . had been impacting our total
15 sales.” (*Id.*)

16 In addition, around the time he wrote his July 2015 letter, Mr. Crossan spoke with Ed Peper,
17 head of Chevrolet’s fleet division, in an effort to obtain additional inventory to fuel his fleet sales. (¶
18 169.) Mr. Crossan stated that Mr. Peper “openly said that at this point, there would be no way that
19 we could get a separate allocation type of an opportunity for inventory.” (*Id.*) Yet Mr. Crossan’s
20 takeaway from the meeting was *not* that he needed to reconsider his fleet practices, but that he could
21 continue, because Folsom Chevrolet was only taking a partial hit to its allocation with every such
22 sale, not a complete loss. (¶ 170.) Notably, at the time (approximately Summer 2015), Mr. Crossan
23 had already been engaging in the practice for years, even though he believed the fleet sales were
24 hurting his dealership’s ability to make retail sales. (*Id.*)

25 Ultimately, Mr. Crossan and Folsom Chevrolet never made a serious effort to curtail their
26 fleet sales, even during the cure period. Mr. Schoonbrood testified that neither Marshal nor Larry
27 Crossan have asked him to change the fleet department’s operations within the last five years, nor
28 has Mr. Kaestner. (¶ 171.)

1 e. Folsom Chevrolet is Highly Compensated for Its Fleet Activities

2 One possible reason Folsom Chevrolet ignored the detrimental effect of its fleet practices for
3 so long is that the department is exceptionally profitable. The dealership's depletion of its inventory
4 generates outsized returns; Mr. Escalante testified that Mr. Schoonbrood informed him "that part of
5 the successful fleet operation that Folsom has is that fleets will pay a premium to have the unit
6 readily available as opposed to just waiting for the fleet unit to be ordered." (§ 172.)

7 As a result, Folsom Chevrolet's fleet gross profits often exceed gross profits on its retail
8 sales, both per unit and as a whole, which its own expert conceded is "uncommon." (§ 173.)
9 Similarly, it often sold more fleet units than retail units overall, another "uncommon" event. (*Id.*) A
10 chart created by Mr. Stockton shows Folsom Chevrolet earned approximately \$3.6 million in gross
11 profits from fleet sales in 2012 to 2016—more than it made by selling retail vehicles. (*Id.*)

12 This is important because the pay plans at Folsom Chevrolet are aligned to support the
13 seeking of gross profit specifically, and thus incentivize profit-laden sales from inventory to fleet
14 customers. (*See* § 174.) Mr. Crossan acknowledged the importance of such sales to Folsom
15 Chevrolet, testifying that fleet sales from inventory have a real "opportunity for profitability," and
16 the department as a whole "certainly has an impact on what the bottom line profit is to the
17 dealership." (§ 174.) And Folsom Chevrolet's own expert opined that it is "acutely aware of its
18 commercial sales activity and what it generates for the dealership." (§ 175.) Thus, even though it was
19 incumbent upon Folsom Chevrolet to impose discipline on its fleet department, it appears the fleet
20 sales Folsom Chevrolet made from inventory were so lucrative it looked the other way. (§ 175.)
21 Indeed, Mr. Stinson testified that he "felt that the fleet manager had the most control of the
22 dealership." (*Id.*)

23 f. Folsom Chevrolet's Business Model is Antithetical to Retail Sales

24 At the hearing, Mr. Schoonbrood testified that the leasing companies he sells to are so large
25 that they own their own dealerships, and so therefore are able to order vehicles through GM's
26 normal (and highly suggested) fleet ordering process themselves. (§ 270.) The implications of this
27 statement are remarkable.

28 These leasing companies own their own dealerships—plural—because it saves them a little

1 bit of money on each sale. They can presumably operate those dealerships for any purpose
2 permissible under their own dealer agreements. Yet rather than build out and take from the
3 inventories of these dealerships—again, plural—to accommodate their “immediate need” for
4 vehicles, they choose to purchase vehicles out of Folsom Chevrolet’s inventory, not their own,
5 paying a premium each time.

6 Looked at in this light, it is plain that Folsom Chevrolet is not really a partner in the business
7 the leasing companies engage in. Rather, *it is a vehicle farm*, continuously raided for inventory those
8 companies are too shrewd to take from their own dealerships. And Mr. Schoonbrood has multiple
9 such leasing companies as clients, meaning Folsom Chevrolet’s inventory is being farmed out to an
10 almost unfathomable degree, all at the expense of its retail operations

11 Folsom Chevrolet has been paid handsomely for this service, but it is simply unsustainable. It
12 is as though a McDonald’s franchisee discovered it could make more money by wholesaling the
13 hamburger buns around the country than by selling Big Macs. That might be profitable in the short
14 term, but it’s really not the business that franchise is supposed to be engaged in. Furthermore, the
15 store’s bun-less burgers are bound to lead to a lot of unhappy customers in the local area.

16 Having knowingly exceeded the bounds of its franchise agreement—and having pocketed
17 millions of dollars in profits for doing so—Folsom Chevrolet is responsible for the consequences
18 that flow from that decision, including its deteriorated retail sales.

19 **2. Folsom Chevrolet’s Sales Staff “Held Out for Gross”**

20 In addition to its profit-seeking in fleet sales, evidence at the hearing demonstrated that
21 Folsom Chevrolet sales staff often “held out for gross.” The phrase refers to “holding a minimum . . .
22 price point that a dealer would not want to drop below,” *i.e.*, having an amount of gross profit on
23 each sale below which it would not drop. (¶ 176.) Mr. Escalante testified that he personally observed
24 that Folsom Chevrolet appeared to be holding out for gross during his weekly visits from 2014 to
25 2016. (*Id.*)

26 The dealership has generally disputed that it held out for gross profits. However, Drew
27 Crossan conceded that when it comes to making a “skinny deal, or a loser deal, in order to move that
28 new car . . . there’s limitations to how much you are willing to do.” (¶ 177.) For example, for any

1 discount “over a couple hundred dollars, we ask that they get . . . myself or the GM involved.” (*Id.*)
2 And data adduced at the hearing undercut Folsom Chevrolet’s position as well, as Folsom Chevrolet
3 was found to price vehicles much higher than composite groups in the Sacramento DMA (¶ 178) and
4 California as a whole (¶ 179.)

5 Vehicle pricing is an operational choice made by each dealership, and dealers that wish to
6 sell a lot of vehicles typically have low gross profits but make it up in volume. (¶ 180-181.)
7 However, as with its fleet salespeople, Folsom Chevrolet’s sales staff was incentivized to maximize
8 gross profits over volume. (¶ 182.) They were very successful at doing so, to the point of becoming
9 arguably overpaid; at the time of the “POP meeting” held in June 2014 to analyze the dealership’s
10 operations (¶¶ 74-75), Folsom Chevrolet was paying out \$1,346 in sales compensation per retail unit,
11 while the Sacramento DMA average was just \$703.⁴ (¶ 183.)

12 This practice undermined Folsom Chevrolet’s ability to make retail sales. Indeed, there was
13 widespread agreement at the hearing, by witnesses from both GM and Folsom Chevrolet, that
14 customers are particularly sensitive to vehicle pricing, particularly in the Internet era. (¶¶ 184-185.)
15 Thus, Mr. Escalante testified that in his opinion, “sales went elsewhere that could have been had
16 because of holding [for] gross” at Folsom Chevrolet. (¶ 185.)

17 With a different approach, Folsom Chevrolet would have sold more vehicles. In fact, when it
18 finally became more aggressive with its pricing in 2016, it in fact began selling more units, to the
19 point where it ended up earning back all the money it “lost” through GM’s volume-based incentive
20 programs. (¶ 186.) As it turned out, 2016 was the dealership’s most profitable year yet. (*Id.*)
21 Accordingly, Folsom Chevrolet did not even have to sacrifice profits to price its vehicles more
22 aggressively for retail sale. The fact that it nonetheless chose not to do so is yet another factor
23 supporting termination.

24 3. Folsom Chevrolet Failed to Implement a Fully Functional BDC

25

26 ⁴ This may explain why, after Mr. Kaestner arrived and altered the dealership’s pay plans to
27 focus more on volume and less on gross profits, there was “almost . . . a hundred percent turnover
28 with the sales force.” (¶ 183.)

1 Another reason why Folsom Chevrolet struggled to make sales is that it lacked a fully
2 functional BDC, or Business Development Center. A BDC is designed to generate appointments for
3 the store by following up on potential sales and service leads. (§ 187.) At the simplest level, it
4 interfaces with potential customers, whether for sales or service, and schedules appointments. (*Id.*)
5 However, a good BDC is also proactive, working from manifest lists—many of which GM
6 provides—to generate additional sales. (§ 188.)

7 Whatever the methods used, the key is that the BDC makes and then confirms customer
8 appointments. (§ 189.) 18 to 28 percent of appointments are converted into sales, which means 12-15
9 appointments would have allowed Folsom Chevrolet to meet its simplified goal of three sales per
10 day. (*Id.*) It also allows the dealership to predict their upcoming sales with high accuracy. (*Id.*) And
11 since it is difficult to get customers into the store when so much shopping is done online, the
12 importance of a functional BDC continues to grow. (*Id.*)

13 However, Folsom Chevrolet's BDC was not effective. (§ 190.) Folsom Chevrolet
14 experienced frequent turnover at the BDC manager ("BDM") position, and failed to hold its sales
15 consultants accountable for setting and confirming appointments. (*Id.*) As a result, it did not
16 consistently set appointments to drive traffic to the store. (*Id.*) Furthermore, Folsom Chevrolet's
17 managers did not consistently call to confirm that claimed appointments had actually been made, a
18 practice employed by successful dealerships such as nearby John L. Sullivan. (*Id.*)

19 The implementation of an effective BDC was a primary suggestion of Mr. Escalante, Mr.
20 Stinson, and Maritz, a third party consultant. (§ 191-193.) However, Folsom Chevrolet continues to
21 struggle with its BDC even today. (§ 194.) The dealership's inability to maintain an effective BDC
22 was therefore both a symptom of its poor operations and a cause of its poor sales performance.

23 4. Folsom Chevrolet's Customers Were Not Satisfied

24 Another cause of poor sales performance at the dealership was its inability to achieve
25 acceptable levels of customer satisfaction. Obviously, this is problematic on its own under the
26 contractual requirements of the Dealer Agreement. (§§ 25-27.) However, customer satisfaction is
27 also a critical aspect of sales performance, because it affects the retention of existing customers, and
28 may also influence whether a customer chooses to visit the dealership at all. (§§ 195.)

1 General Motors measures customer satisfaction in the form of customer surveys. (§ 196.)
2 There are two different surveys that are administered: The PDS (Purchase and Delivery Satisfaction)
3 survey relates to a customer's experience during the purchase process for a new vehicle, and the SSS
4 (Service Satisfaction Score) survey relates to a customer's experience when their vehicle needs
5 warranty repair or maintenance. (*Id.*) This is comparable to the practices employed by other
6 manufacturers, and at the hearing Folsom Chevrolet failed to show any flaws in the data or GM's
7 practices in this regard. (§§ 327-330.) In fact, the evidence showed that Folsom Chevrolet relied on
8 the PDS and SSS data. (§ 330.)

9 Evidence at the hearing showed that Folsom Chevrolet scored below the Regional average in
10 PDS every year from 2012 to 2017. (§ 197.) Furthermore, it exhibited a noticeable negative trend,
11 declining every year starting in 2013 and falling ever further away from the Regional average. (*Id.*)
12 And while the dealership typically performed better in SSS, it received extremely poor scores from
13 customers in 2014, scoring just a 65.4—well below the Region average. (*Id.*)

14 Testimony in the record indicates that these measures directly influence a dealership's retail
15 sales capabilities. Mr. Stinson described PDS as "a big indicator of future sales." (§ 198.) Mr.
16 Escalante testified that he has observed that a deteriorated PDS has "a correlation with lower sales."
17 (*Id.*) And Mr. Meier stated that "CSI performance, given customers do have choice, will impact the
18 number of consumers that you can attract to the dealership." (*Id.*) Thus, while "word of mouth of
19 customers satisfied at the dealership is instrumental in continuing to attract new consumers in a
20 community . . . CSI performance that is below regional average will have a pretty significant effect
21 on the ability to attract and retain customers." (*Id.*)

22 The effects of the dealership's poor customer satisfaction also show up in dealer customer
23 loyalty reports. (§ 199.) These reports show that Folsom Chevrolet continuously struggled to retain
24 customers; between February 2012 and May 2015, its 3 month trend never once reached the average
25 of the District, Zone, Region, or Nation. (*Id.*) In 2014—the same year its SSS scores cratered—
26 Folsom Chevrolet's dealer loyalty rate was as low as 5 or 6 percent. (*Id.*) In other words, only 1 in
27 20 customers who purchased a vehicle from Folsom Chevrolet returned to purchase there again. (*Id.*)
28 Neither the Chevrolet brand nor the Chevrolet product were the issue, as a large number of

1 defections were to other Sacramento Chevrolet dealerships. (§ 200.) It therefore appears the problem
2 was the purchasing experience at Folsom Chevrolet.

3 Poor customer satisfaction is within the control of the dealership, and itself a basis for
4 termination. However, to the extent poor customer satisfaction also impacted Folsom Chevrolet's
5 retail sales performance, it is yet another factor in support of termination.

6 **5. Folsom Chevrolet Failed to Hold its Personnel Accountable**

7 Another cause of poor sales performance at Folsom Chevrolet identified at the hearing was a
8 failure to hold its personnel accountable. This effect can be seen at every level of the dealership's
9 operations, from its inability to rein in Mr. Schoonbrood's harmful but lucrative fleet practices, to
10 the high gross profits—and therefore compensation—earned by its sales staff, to the inability to
11 implement a functional BDC and consistently make appointments.

12 It was also a problem that hampered Folsom Chevrolet's ability to implement the suggestions
13 made by General Motors and Maritz. For example, Folsom Chevrolet's former general sales
14 manager, David Shirley, failed to implement many tasks he agreed to during Maritz meetings, such
15 as creating a BDC, hiring a CSI manager, or reviewing leads and manifest lists. (§ 202.) GM
16 discreetly suggested that Folsom Chevrolet consider a change at the position, but the dealership
17 failed to hold Mr. Shirley accountable for too long: by the time Mr. Shirley was let go, he had
18 stopped doing his job at all. (*Id.*) Indeed, it appears even Mr. Shirley agreed it was time for him to
19 go—when he was fired, he told Mr. Crossan that he “should have let him go six months earlier.”
20 (*Id.*) After Mr. Shirley was finally let go, the dealership experienced positive changes to its website,
21 marketing practices, phone calls and leads—and ultimately, improved sales. (*Id.*)

22 The problem was echoed in the testimony of two relative newcomers to Folsom Chevrolet,
23 Brian Kaestner and Lisa Castro, the dealership's controller. Ms. Castro, who joined Folsom
24 Chevrolet in November 2015, perceived “complacency” among certain personnel at the dealership,
25 particularly in the used and new vehicle sales department. (§ 204.) For example, “[t]he sales manager
26 just did not do the daily duties, the back to basics that are expected of a sales manager,” and was
27 instead just “[w]aiting for a car deal.” (*Id.*) Mr. Kaestner, meanwhile, diplomatically testified that
28 when he started, the dealership had “a lot of employees with tenure.” (§ 203.)

1 Folsom Chevrolet's failure to hold its personnel accountable was the final likely cause of its
2 poor sales performance, and was squarely within the control of the dealership. This failure is yet
3 another reason why termination of the Dealer Agreement is appropriate.

4 **C. Folsom Chevrolet's Excuses for its Failures are Unpersuasive**

5 As shown above, numerous aspects of Folsom Chevrolet's operational decisions have
6 contributed to the dealership's poor performances since 2012. In return, Folsom Chevrolet made a
7 number of excuses in an attempt to explain away its undeniably poor sales performance, but none of
8 these excuses holds up to scrutiny.

9 The first reason for poor performance, often raised by Folsom Chevrolet witnesses, is that the
10 dealership has not had enough inventory to satisfy its sales obligations. However, the evidence
11 showed that General Motors has a long-standing, formula-based system in place to ensure dealers
12 receive fair and equal treatment in the vehicle allocation process. (¶¶ 207-213.) On top of that, GM
13 provided Folsom Chevrolet with supplemental allocation through the Business Elite program, STMI
14 discretionary allocation, and the notice of cure process. (¶¶ 214-218, 232-234.) As a result, Folsom
15 Chevrolet generally had an adequate available days' supply of vehicles. (¶¶ 220-221.)

16 The likely cause of any inventory problems was not the availability of product from General
17 Motors, but rather Folsom Chevrolet's practice of selling its inventory to fleet customers. In
18 addition, the dealership turned down, or failed to request, *hundreds* of vehicles per year since 2012.
19 (¶¶ 222-226.) Consequently, Folsom Chevrolet certainly had the opportunity to obtain enough
20 inventory to meet its sales targets. (¶¶ 227-231.) It may not have taken full advantage of those
21 opportunities, or it may just be making excuses after the fact, but either way, the record reflects that
22 any issues with Folsom Chevrolet's inventory were of its own making.

23 Folsom Chevrolet has also argued that the territory assigned to it in 2011 has increased its
24 sales expectations, making it impossible to meet 100 RSI. Yet Folsom Chevrolet never objected to
25 its territory when assigned, and the objections it made in 2013 are entirely different from those it
26 raised at the hearing. (¶¶ 239-245.) Furthermore, Folsom Chevrolet's territory is not unreasonably or
27 unusually large, and testimony supported that its AGSSA is reasonably constructed given the
28 shopping habits of consumers in the area. (¶¶ 246-256.)

1 Meanwhile, Folsom Chevrolet's sales expectations are reasonable, and almost exactly in line
2 with those of other Sacramento dealers. (§§ 249.) Indeed, operating from the same location, Folsom
3 Chevrolet itself used to make more than enough sales in the early to mid 2000s to meet its current
4 sales expectations. (§ 286.) If anything, conditions are more favorable to Folsom Chevrolet now than
5 before, given record automobile sales nationwide, strong Chevrolet market share growth, and
6 economic growth and an increase in population in the city of Folsom of more than 39% from 2000 to
7 2010. (§ 287.) Its domestic competitors in the Folsom Auto Mall, Ford and Chrysler, have no trouble
8 achieving the sales volumes expected of Folsom Chevrolet or their own sales expectations, all of
9 which are all also based on state average. (§ 288.)

10 As a result, the idea that Folsom Chevrolet cannot meet GM's sales expectations is just not
11 credible. Indeed, its new general manager, Mr. Kaestner, testified he's "used to doing 200 to 250
12 cars a month" and would like to sell close to 2,000 cars per year. (§ 290.) He said that "to do a
13 hundred cars a month or to do 125 or 150 cars a month, it's like watching paint dry." (§ 291.) Given
14 that testimony, it is difficult to believe that GM's goal of 109 new vehicles for the month is truly "a
15 far reach." (§ 291.)

16 Folsom Chevrolet's final argument, put forth by its expert, Mr. Stockton, is that the RSI
17 calculation itself is flawed. This argument is unavailing. In its PFF, GM set forth a litany of reasons
18 why Mr. Stockton is incorrect, including that:

- 19 • General Motors has a reasonable interest in measuring the performance of its dealers,
20 as even Mr. Stockton admits, and as Folsom Chevrolet does by setting and enforcing
sales objections for its salespeople (§§ 272-274);
- 21 • RSI and equivalent metrics have been used by the auto industry for decades (§§ 275-
22 76);
- 23 • The RSI calculation is transparent, conservative, and objective (§§ 277-278);
- 24 • RSI takes into account local conditions and consumer preferences, including
economic factors, household income, and vehicle type preferences (§§ 279-282);
- 25 • The use of expected sales is reasonable as a general premise, and the expectations set
26 for Folsom Chevrolet are reasonable in themselves (§§ 283-291);
- 27 • The experiences of other California dealerships confirms that Folsom Chevrolet can
28 meet its sales goals, as GM provided numerous examples of dealerships which were
able to take advantage of increases in opportunity in expected sales, as well as
dealerships which were able to improve performance by changing operations (§§ 292-

1 296);

- 2 • Folsom Chevrolet's RSI ranking is confirmed by other metrics, including those suggested by Mr. Stockton (§§ 297-300); and
- 3 • Folsom Chevrolet's poor sales performance, as measured by RSI, is confirmed by
- 4 GM's extensive counseling: quarterly meetings with Mr. Stinson; 200+ visits from
- 5 Mr. Escalante over four years; free consultations with Maritz representatives; an in-
- 6 depth POP analysis; repeated AGSSA configuration reviews; STMI and supplemental
- allocation of vehicles; and more. (§§ 301-302.)

7 Against these facts, Mr. Stockton's criticisms bear little weight. Furthermore, Mr. Stockton's

8 analyses suffer from major flaws, including his misleading attempts to conflate numbers from

9 various benchmarks (§§ 306-307) and methodological errors committed during his "ring"

10 calculation. (§§ 322-325.) Mr. Stockton's purported "demographic model," meanwhile, is deeply

11 faulty, taking various correlations he discovered in large data sets and attempting to use it to show

12 Folsom Chevrolet is being unfairly hurt by the demographics of its area. (§§ 308-316.) Yet as

13 explained in the companion PFF, there are many correlations between variables that are "statistically

14 significant," but clearly due to nothing more than random chance—like the statistically significant

15 correlation between "per capita consumption of mozzarella cheese" and "civil engineering

16 doctorates awarded." (§ 310.) To that end, Mr. Stockton failed to show that the demographics he

17 selected actually cause low registrations, as opposed to simply being correlated with them. (§ 313.)

18 The evidence in the record indicates that these demographic variables in fact have nothing to do with

19 sales, but are simply "noise." (§§ 314-316.)

20 Mr. Stockton did find other ways to try to make Folsom Chevrolet look better, but these were

21 plainly ends-driven. For example, he made adjustments in his model based on whether or not a

22 dealership is in the "5 County Area," but the selection of these counties was entirely arbitrary. (§

23 317.) Ultimately, Mr. Stockton's model simply raises the perceived sales effectiveness of every

24 dealership within the 5 County Area by about 30 points—an exercise in lowering the bar to make the

25 jump look higher. (§ 318.) Mr. Stockton also created a metric called TSI, which incorporates fleet

26 sales, but this creates so many problems that even Mr. Stockton admitted that he would not advocate

27 its use. (§ 319-321.) Finally, Mr. Stockton's "ring" analysis is not only methodologically unsound, it

28 only shows Folsom Chevrolet to be 71% as effective as the average Sacramento dealer. (§ 322-325.)

1 Thus, at bottom, Mr. Stockton failed to put forward *any* reliable measure of sales
2 performance that showed Folsom Chevrolet to be even an average performer. Folsom Chevrolet is
3 below 100 percent using RSI; it is below 100 percent using Mr. Stockton's demographic model; it is
4 below 100 percent using Mr. Stockton's ring analysis; it is below 100 percent using Northern
5 California as the benchmark for market share; and it is below 100 percent using the Sacramento
6 DMA as the benchmark for market share. (§ 326.)

7 Consequently, by any measure considered during the hearing, Folsom Chevrolet is extremely
8 poor at making retail sales. As a result, it fails to transact the business available to it, justifying
9 termination of its Dealer Agreement under this prong of the Vehicle Code. As will be shown below,
10 however, these failures also intertwine with and support termination under numerous other statutory
11 factors.

12 **II. FOLSOM CHEVROLET'S INVESTMENT IN ITS BUSINESS IS RELATIVELY** 13 **MINIMAL AND IMPERMANENT (CAL. VEH. CODE §§ 3061(B), (C))**

14 The second and third good cause factors look at both the "[i]nvestment necessarily made and
15 obligations incurred by the franchisee to perform its part of the franchise" as well as the
16 "permanency" of that investment. Cal. Veh. Code §§ 3061(b), (c). Mr. Brian Gaspardo, an
17 accounting expert, analyzed the dealership and credibly testified they support termination. By
18 contrast, Folsom Chevrolet's expert, Mr. Woodward, failed to engage in any real analysis, acted as a
19 mouthpiece for Folsom Chevrolet's counsel, and gave an opinion of its investments so unreasonably
20 inflated that even he could not support it. (§ 347.)

21 **A. Folsom Chevrolet's Investment is Minimal**

22 Folsom Chevrolet's net worth is \$3.6 million. (§§ 331-34.) This number considers dealership
23 assets as well as liabilities. (§ 337.) However, while this number may be considered an investment,
24 there are some additional considerations which may warrant a downward adjustment to this amount.
25 Additionally, as will be discussed below, much of Folsom Chevrolet's assets are current in nature,
26 which means they are not "permanent" investments by definition. (§§ 354-360.)

27 One consideration in favor of a downward adjustment is the fact that Folsom Chevrolet's net
28 worth includes about \$2.37 million dollars received under GM's "EBE" incentive program from

1 2009 to 2016. (¶ 338.) This money is paid by GM primarily to incentivize dealership remodeling of
2 the type Folsom Chevrolet performed from 2013 to March 2014. (*Id.*) According to Mr. Crossan,
3 Folsom Chevrolet only paid between \$800,000 and \$900,000 for that construction, meaning Folsom
4 Chevrolet received around \$1.5 million in excess of construction costs that would have been simply
5 retained as income. (¶¶ 338-339.) There is nothing wrong with doing so, but it does merit
6 consideration in the context of determining *Folsom Chevrolet's* investment. (¶ 339.) To the extent
7 the dealership's \$3.6 million net worth reflects funds received directly from GM to improve the
8 business, that total does not show entirely Folsom Chevrolet's investment, but rather GM's
9 investment as well. (*Id.*)

10 There are two other considerations in addition to the EBE program. First, GM was the source
11 for nearly all of the funds needed to begin the dealership in 1992, including three quarters of the
12 original capital. (¶ 340.) Furthermore, GM provided Folsom Chevrolet with extensive support and
13 resources upon its opening, including up to \$780,000 worth of parts and space within an excellent
14 facility. (¶ 341.) A GM affiliate was also the source for the funds used to buy the land and build the
15 facility upon which Folsom Chevrolet sits. (¶ 342.)

16 Second, the record reflects that Mr. Crossan and Folsom Chevrolet have made an excellent
17 return from their investments just since 2012, including \$3.7 million dollars in net profits, \$1.8
18 million dollars in personal income for Mr. Crossan, and more than six million dollars in rent and tax
19 payments for land owned by Mr. Crossan's personal trust. (¶¶ 343-345.) Thus, while Folsom
20 Chevrolet has of course made investments in its business, they have already been recouped.

21 **B. Folsom Chevrolet has Minimal Permanent Investments**

22 Mr. Woodward opined that the dealership's permanent investments are between \$14,700,000
23 and \$37,363,191. (¶ 347.) The enormous range—nearly \$23 million—suggests that Mr. Woodward's
24 analysis is largely speculative, and indeed, it contains a large number of flaws.

25 First, many of the valuations asserted by Mr. Woodward are simply unverified estimates of
26 value he received from Folsom Chevrolet's counsel. (¶¶ 348-350.) This criticism applies to his blind
27 acceptance of values for property which can be professionally appraised, such as real estate, as well
28 as for easily verifiable information such as the amounts outstanding in a long-term computer lease.

1 (*Id.*) Because Folsom Chevrolet failed to submit any foundation for these valuations, they bear little
2 weight.

3 Second, Mr. Woodward curiously ignored all liabilities in determining investment. (§ 351.)
4 The only rationale Mr. Woodward provided for these decisions was the circular claim that “we’re
5 valuing assets,” which makes little sense since the Vehicle Code is concerned with investments, not
6 assets, and assets alone cannot be valued in isolation without considering the corresponding liability.
7 (*Id.*; §§ 331-333.) However, the result is to massively inflate Folsom Chevrolet’s value. Mr.
8 Gaspardo explained the issue well: “if I buy a Bitcoin today for a thousand dollars and it goes up to a
9 million dollars, my investment was still the thousand dollars. I didn’t invest any new amounts of
10 money. I don’t have any additional amounts at risk.” (*Id.*) Similarly, a \$500,000 house purchased
11 with purely borrowed money, and no equity, is not a \$500,000 investment for the purchaser because
12 there is “no money at risk.” (*Id.*) In that scenario, the investment would all be from the bank or
13 mortgage issuer. (*Id.*)

14 Third, Mr. Woodward lumped in clearly nonpermanent assets such as cash into his
15 calculation of “permanent investment.” (§§ 353-355.) He also failed to account for Folsom
16 Chevrolet’s ability to recover funds from its assets, instead simply assuming all assets represent
17 permanent investments. (§ 353.) Mr. Gaspardo, by contrast, went through each category of assets
18 and specifically analyzed the recoverability of those assets, ultimately concluding the dealership has
19 little or no permanent investments. (§ 354.) This is because the definition of a “permanent
20 investment” is simple: whether or not the funds invested in it can be recovered, as opposed to being
21 a “sunk cost.” (§§ 335-336.)

22 For example, all of Folsom Chevrolet’s current and working assets (the bulk of its assets) are
23 expected to be recovered within 12 months, if not much earlier, and are therefore recoverable and
24 not permanent. (§§ 354-360.) Some portion of Folsom Chevrolet’s fixed assets may be permanent,
25 but Mr. Woodward’s own analysis indicated that the real-world value of these items is greater than
26 their listed book value. (§ 361.) Thus, it appears the full value or more can be recovered from these
27 fixed assets, making them non-permanent. (*Id.*) Meanwhile, other items, such as contingent
28 liabilities, long-term obligations, and personal guarantees, either have insufficient support in the

1 record to be considered and/or are not investments of the dealership. (§§ 362-364.)

2 In addition, there were two other categories of assets considered by Mr. Woodward which
3 cannot be considered permanent investments of Folsom Chevrolet. The first is the real estate the
4 dealership sits on, which is owned by a trust controlled by Mr. Crossan, not the “franchisee.” (§
5 365.) Even if considered an investment of the dealership, however, in the event of termination, Mr.
6 Crossan could choose to sell the property for a profit—according to Folsom Chevrolet’s own
7 witnesses—or utilize his contractual right to lease the property until at least 2024, guaranteeing a
8 substantial income. (§§ 366-367.) Any real estate investment is therefore clearly recoverable and not
9 permanent. (*Id.*)

10 The second category inappropriately considered a permanent investment by Mr. Woodward
11 is goodwill. (§ 368.) However, for numerous reasons, not only is goodwill not a permanent
12 investment, it isn’t an investment at all—it is a “hoped for return.” (§§ 368-372.) It is also tied
13 almost exclusively to the Dealer Agreement, not Folsom Chevrolet, and its value cannot be
14 determined without selling the dealership. (*Id.*) Thus, Mr. Woodward conceded that even he doesn’t
15 “know where you tie [goodwill] into the word ‘investment,’” and “[i]t’s possible it’s not permanent.”
16 (§ 372.)

17 Careful analysis therefore reveals that any investments made by Folsom Chevrolet have been
18 recouped, and any remaining investments are likely not permanent. Mr. Woodward’s claims to the
19 contrary are inflated by numerous inappropriate considerations, and as a result, are not credible.
20 Both factors therefore support termination.

21 **III. THE PUBLIC WELFARE IS HARMED BY ALLOWING FOLSOM CHEVROLET**
22 **TO REMAIN AS AN INEFFECTIVE DEALER THAT DOES NOT SERVE THE**
23 **MARKET (CAL. VEH. CODE § 3061(D))**

24 The fourth good cause factor analyzes “[w]hether it is injurious or beneficial to the public
25 welfare” to terminate Folsom Chevrolet. Cal. Veh. Code § 3061(d). Folsom Chevrolet’s failure to
26 adequately meet the demand of the consumers in the Folsom and Sacramento area shows that
27 replacing Folsom Chevrolet with a vigorous, consumer-friendly dealer will benefit consumers.
28 Conversely, if Folsom Chevrolet’s Dealer Agreement is not terminated, the dealership will continue

1 to provide inadequate operations for consumers in the market.

2 As described above, Folsom Chevrolet has done a poor job of providing a positive sales
3 experience to customers in the Folsom and Sacramento markets. The dealership routinely focuses on
4 fleet sales over retail, leaving it with a shrunken, imbalanced inventory not targeted to local
5 customers. (§§ 158-163.) Even when the inventory is available, however, the dealership's gross
6 profits per vehicle are unusually high, meaning that they are selling their vehicles at an unusually
7 high profit margin. (§§ 176-186.) Not only does this equate to higher prices for consumers, it also
8 results in Folsom Chevrolet selling fewer vehicles, because consumers are forced to go to other
9 dealerships, even those located many miles away, to buy the same car or truck for less. (*Id.*)

10 In addition, the dealership performs consistently poorly on measures of customer satisfaction
11 with the purchasing experience. (§§ 195-198.) The dealership also performs poorly on dealer loyalty
12 measures, as customers who visit Folsom Chevrolet and have a bad experience do not return. (§§
13 199-200.)

14 A more zealous dealer focused on retail sales and retail customers will therefore be beneficial
15 to the public welfare, providing better service to customers, generating more sales (and tax revenue)
16 in the area, stocking better inventory, and at lower prices. (§ 123.) The evidence at the hearing
17 showed that GM intends to immediately appoint such a dealer in Folsom if this protest is denied.
18 (*Id.*) Accordingly, having failed to meet consumer demand and provide a positive and convenient
19 customer experience, consideration of the injury and benefit to the public favors termination.

20 **IV. FOLSOM CHEVROLET IS NOT WELL EQUIPPED TO MEET THE NEEDS OF**
21 **THE PUBLIC (CAL. VEH. CODE § 3061(E))**

22 The fifth good cause factor broadly considers whether Folsom Chevrolet is well equipped, in
23 terms of sales and service facilities, personnel, equipment, and parts, to adequately serve the public.
24 Cal. Veh. Code § 3061(e). For the reasons provided above, overall, it is not. Despite the dealership's
25 remodeled facility, it has failed to maintain an inventory desirable to retail customers, or hold its
26 personnel accountable for performance. (§§ 158-163, 201-204.) In addition, Folsom Chevrolet
27 continues to focus on more-lucrative fleet and commercial sales outside of the Sacramento area to
28 the detriment of the local public. (§§ 164-175.) It also has a mere 11 salespeople, despite pushing for

1 years to get at least 15 to 18, and despite having employed approximately 28 salespeople during the
2 mid 2000s. (RT Vol. 6, 179:11-15 (M. Crossan), RT Vol. 8, 89:12-90:2 (L. Crossan); *see also* P113
3 (showing minimal increase in salespeople from 2011 to 2016).)

4 The definitive proof of this factor is found in the dealership's poor measures of customer
5 satisfaction and loyalty. (¶¶ 195-200.) If Folsom Chevrolet was adequately equipped, customers who
6 have purchased there would not be reporting dissatisfaction in surveys or going elsewhere for a
7 second vehicle. Accordingly, this factor supports termination.

8 **V. FOLSOM CHEVROLET HAS OCCASIONALLY FAILED TO FULFILL**
9 **WARRANTY OBLIGATIONS (CAL. VEH. CODE § 3061(F))**

10 The sixth good cause factors asks whether Folsom Chevrolet "fails to fulfill the warranty
11 obligations of the franchisor to be performed by the franchisee." Cal. Veh. Code § 3061(f). GM does
12 not dispute that generally, Folsom Chevrolet has fulfilled its service obligations. However, the
13 record does reflect that Folsom Chevrolet suffered from serious issues on the service side in 2014,
14 when its "SSS" customer satisfaction scores cratered. (¶ 80.) Folsom Chevrolet has not attempted to
15 explain the reasons why customers were so dissatisfied at the time.

16 More recently, the record reflects that in June 2016, Folsom Chevrolet performed warranty
17 engine work on a Corvette that resulted in "catastrophic engine damage" due to an issue with
18 improper tolerances. (¶ 108.) Investigation revealed this was likely an issue with the work performed
19 by the technician. (*Id.*) The record also reflects that Folsom Chevrolet sold two vehicles that were
20 subject to mandatory recalls for defective airbags, a violation of federal law. (*Id.*) This is a serious
21 issue, implicating safety concerns for customers, and liability concerns for the customer, dealer, and
22 GM. (*Id.*)

23 Accordingly, while the dealership's mistakes have been relatively few, they have been very
24 severe when they occurred. GM does not view this factor as a basis for termination, but it does not
25 weigh in favor of Folsom Chevrolet either.

26 **VI. FOLSOM CHEVROLET HAS COMMITTED MATERIAL BREACHES OF ITS**
27 **SALES AND SERVICES AGREEMENT (CAL. VEH. CODE § 3061(G))**

28 The final "good cause" factor considers the "[e]xtent of franchisee's failure to comply with

1 the terms of the franchise.” Cal. Veh. Code § 3061(g). Each of the deficiencies described above
2 regarding the inadequate operation of Folsom Chevrolet’s business also constitutes a failure to
3 comply with the express terms of the Dealer Agreement:

- 4 • **Sales.** Indisputably, as explained above, Folsom Chevrolet has failed to meet its
5 obligations under the Dealer Agreement with respect to sales performance, both in terms
6 of its failure to aggressively market vehicles as well as its failure to achieve satisfactory
7 RSI. (R201 (Dealer Agreement) at §§ 5.1.1, 9.)
- 8 • **Customer Satisfaction.** As explained above, Folsom Chevrolet has continuously
9 underperformed with respect to customer satisfaction compared to other Chevrolet
10 dealerships in the Region. (*Id.* at §§ 5.1.1(e), 5.2.1, 5.3.)
- 11 • **Inventory.** As explained above, Folsom Chevrolet has failed to keep a sufficient mix of
12 models and series of new vehicles in stock to meet retail demand as required by the
13 Dealer Agreement, instead stocking a large quantity of vehicles suitable for fleet and
14 commercial sales. (*Id.* at § 6.4.1.)
- 15 • **Staffing.** As explained above, Folsom Chevrolet has failed to employ and hold
16 accountable sufficient personnel to meet its expected sales numbers and ensure customer
17 satisfaction. (*Id.* at § 5.1.1(a).)
- 18 • **Personal Services.** As explained above, Mr. Crossan has failed to exercise full
19 managerial authority over the dealership’s operations and its employees, as required by
20 the Dealer Agreement. (*Id.* at § 2.)

21 The bases for termination described in the Notice of Termination were the dealership’s
22 material breaches of its sales and customer satisfaction obligations under the Dealer Agreement, as
23 shown by its RSI and CSI scores. (¶ 115.) The final decision to terminate was made by Mr. Ron
24 Meier, Regional Director for Chevrolet’s Western Region. (¶ 114.)

25 Prior to making his decision, Mr. Meier consulted with numerous GM representatives,
26 including Mr. Stinson (who relayed the information learned by Mr. Escalante) Mr. Giguere, in-house
27 counsel, and other GM personnel. (*Id.*) Mr. Meier learned of the dealership’s operations from Mr.
28 Stinson, including its over-emphasis on fleet sales, its failure to hold managers accountable, and Mr.
Crossan’s failure to exercise personal services as required by the Dealer Agreement. (*Id.*) With Mr.
Giguere, Mr. Meier reviewed the dealership’s substandard RSI over the course of years and
confirmed the dealership’s AGSSA was properly configured. (*Id.*) Mr. Giguere further confirmed
that using the Sacramento DMA as a benchmark, instead of California state average, made no

1 material difference to Folsom Chevrolet's RSI. (*Id.*) Mr. Giguere's analyses are referenced in the
2 Notice of Termination. (*Id.*) Mr. Meier also reviewed numerous documents, including the quarterly
3 contact letters, correspondence between GM and the dealership, analyses of CSI deficiencies, and
4 the overall RSI trend, as shown in quarterly sales performance reviews. (§ 116.)

5 Based on all of this information, Mr. Meier and GM determined that Folsom Chevrolet had
6 materially breached the Dealer Agreement through its "profound and prolonged" deficiency in the
7 PDS and SSS metrics, as well as the dealership's "very, very deficient" RSI and continuous ranking
8 at the bottom of the state of California in sales performance. (§ 117.) These numerous, material
9 breaches of the Dealer Agreement persisted for years, despite GM's constant notifications that the
10 terms of the Dealer Agreement were in breach, and despite GM's continuous, focused assistance to
11 help Folsom Chevrolet cure these breaches. Folsom Chevrolet nonetheless failed to remedy its
12 numerous breaches of the Dealer Agreement. Accordingly, termination of the contract is warranted.

13 CONCLUSION

14 For the reasons outlined above, good cause exists to terminate Folsom Chevrolet's Dealer
15 Agreement.

16
17 Dated: May 16, 2018

18 Respectfully submitted,

19
20 /s/ Robert E. Davies

21 Robert E. Davies, Esq. (California Bar No. 106810)

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23 ~and~

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Nelson Mullins Riley & Scarborough LLP

26 Counsel for General Motors LLC
27
28

1 **PROOF OF SERVICE**

2 CAPTION: FOLSOM CHEVROLET, INC. d/b/a FOLSOM CHEVROLET, Protestant
3 v. GENERAL MOTORS, LLC, Respondent

4 BOARD: NEW MOTOR VEHICLE BOARD

5 PROTEST NOS.: PR-2483-16

6 I am employed in the County of Sacramento, State of California. I am over the age of 18 years and
7 not a party to this action. My business address is 1 Natoma Street, Folsom, California 95630. On
8 **May 16, 2018**, I served the foregoing **RESPONDENT GENERAL MOTORS LLC'S POST-
9 HEARING BRIEF** on each party in this action, as follows:

10 Halbert Rasmussen
11 Scali Rasmussen
12 800 Wilshire Boulevard, Suite 400
13 Los Angeles, CA 90017
14 Telephone: (213) 239-5622
15 Email: hrasmussen@scalilaw.com

16 Attorneys for Protestant

- 17 ☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at
18 Sacramento, California, with postage thereon fully prepaid. I am readily familiar with
19 the firm's practice of collection and processing documents for mailing. It is deposited
20 with the United states postal service each day and that practice was followed in the
21 ordinary course of business for the serve herein attested to.
- 22 ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of
23 Court, Rule 2003, and no error was reported by the machine. Pursuant to California
24 Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the
25 transmission, a copy of which is attached to this Affidavit.
- 26 ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with
27 the next day service.
- 28 ☒ (BY E-MAIL) at the e-mail address listed above.

Executed on **May 16, 2018**, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

23 
24 Dawne Camilleri